record, months-after-the fact investigation by the Solicitor General hardly can be an adequate substitute for an adversary hearing in open court at the time of trial.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 520 and 521

ANTHONY JOSEPH CIMINI and
JOHN J. O'MALLEY,
Petitioners,
v.
UNITED STATES OF AMERICA
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners, Anthony Joseph Cimini and John J. O'Malley, hereby petition the Supreme Court for rehearing of its order denying the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Petitioners' reasons are as follows:

I.

AS A MATTER OF PUBLIC RELATIONS, THIS COURT SHOULD LET THE STATES KNOW THAT IT WILL PATROL THE FEDERAL COURTS TO PREVENT UNFAIRNESS WITH THE SAME VIGOR THAT IT DISPLAYS IN PREVENTING THE STATES FROM VIOLATING DUE PROCESS.

In the past half century, this Court has reviewed a substantial number of state convictions involving constitutional questions related to pretrial and trial publicity. For example see *Shepherd v. Florida* (1951), 341 U.S. 50 (concurring opinion); *Irvin v. Dowd* (1961); 366 U.S. 717; *Rideau v. Louisiana* (1963), 373 U.S. 723; *Sheppard v. Maxwell* (1966); 384 U.S. 333; *Moore v. Dempsey* (1923), 261 U.S. 87; *U. S. ex rel. Darcy v. Handy* (1956), 351 U.S. 454; *Estes v. Texas* (1965), 381 U.S. 532; *Beck v. Washington* (1962), 369 U.S. 541; and *Stroble v. California* (1952), 343 U.S. 181.[1]

Most of these cases generated extensive and multiple opinions in this Court. During the same period, by way of contrast, not a single authored opinion has come out of this Court relating to pretrial or trial publicity in a Federal case. Only once has the Court written on this subject at all and that was the brief *per curiam* opinion in *Marshall v. United States* (1959), 360 U.S. 310.

The failure of the court to consider such questions in the context of a Federal prosecution was not from a lack of opportunity. The issues have been unsuccessfully tendered to this court on many occasions. For example, see *Miller v. United States*, 392 U.S. 929, denying certiorari to *U. S.*

[1] Decision in each case did not always turn on the publicity issue nor was the prisoner always successful. The only point we make is that this Court was willing to review the questions.

v. Miller, 381 F. 2d 529, and the number of cases cited in the annotation at 3 L ed 2d 1250 wherein this court denied certiorari to review such questions in Federal prosecutions.

This Court has often said that the administration of justice must not only be fair but it must have the appearance of fairness. The Court should rightly concern itself with the appearances created by the exercise of its powers. If it appears that this Court is ignoring its own backyard while enforcing a cleanup program against the state courts, such will not promote the harmony which should exist among the partners in our dual judicial system.[2]

II.

THE DECISIONS OF THE COURT ON DIRECT AND HABEAS CORPUS REVIEW OF STATE CASES, TURNING AS THEY DO ON THE SOLE ISSUE OF DUE PROCESS, DO NOT OFFER SUFFICIENT GUIDELINES TO THE FEDERAL COURTS UNLESS THIS COURT IS PREPARED TO SAY THAT UNFAIRNESS IN FEDERAL PROSECUTIONS IS TOLERABLE IF NOT SO UNFAIR AS TO BE A DENIAL OF DUE PROCESS.

In *Sheppard v. Maxwell,* much of what the Court said would have been more appropriate to a case in which it was directly reviewing the judgment of a court over which it had supervisory power.[3] For example, what the Court

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[2] Appearances can be deceiving. For example, this court summarily reversed a Federal conviction in *Janko v. United States,* 366 U.S. 716 because of prejudicial trial publicity, but it did so without opinion. The judicial politics of our dual system requires that this Court let the states know by formal opinion from time to time that it is imposing upon the Federal Courts the same limitations that it imposes upon the state courts in this area of trial publicity.

[3] "[We possess] no such corrective power over state courts as we do over the Federal courts." *Hoag v. New Jersey* (1958), 356 U.S. 464, 471.

suggested as procedure for the trial court to follow in handling publicity near or at the time of trial, 384 U.S. 358-362 was clearly dictum stated only by way of argument to support the ultimate conclusion that *Sheppard* was denied due process by the Ohio Court.

Contrast the extensive opinion in *Sheppard* with that in *Marshall*. While the court specifically recognized its duty "in the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the Federal Courts", 360 U.S. at 313, *its holding was confined to one brief paragraph* which opened:

> "The trial judge has a large discretion in ruling on the issue of prejudice . . . . Each case must turn on its special facts. 360 U.S. at 312."[4]

This language so watered down the decision that the Sixth Circuit was able to cite it rather than the actual holding which followed and thus sustained the conviction in *United States v. Rubino*, decided July 30, 1970.

Certainly the trial judge should have discretion in handling the publicity problem. But just as certainly he should be given more specific guidelines to aid him in the exercise of that discretion. The dictum of *Sheppard v. Maxwell* is not an adequate substitute for instructions from this Court in a case in which it is exercising its supervisory power.

If those members of this Court who voted to deny review of this case did so in the belief that the Court's decisions

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[4] The court cited *Holt v. United States* (1910), 218 U.S. 245 a case which, far from being revitalized by current citation, should have been overruled. While the result in *Holt could have* been justified on the theory of waiver by the failure of the defendant to bring the offensive news articles to the attention of the judge before verdict, the actual rationale of decision is clearly inconsistent with the current views of the Supreme Court in applying the due process clause in State cases.

on review of state convictions are sufficient, they are, in effect, saying that a defendant in a federal criminal trial need be protected by the trial judge from adverse publicity only to the extent that due process requires it. This notion has long been rejected.[5]

> "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force." *McNabb v. United States* (1943), 318 U.S. 332, 340.

In summation, review of the important questions we have presented will permit this Court, either in the exercise of its supervisory power or by implementation of the Fifth Amendment, to conform the practice of the Sixth Circuit to that of the other Circuits and to state in unmistakable language that all Federal courts are, at the very least, under the same obligations which this Court has imposed upon the state courts as a matter of due process under the Fourteenth Amendment.

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[5] If the prosecution should deliberately leak information to the news media which is derogatory to the defendant, this alone might not be a denial of due process under all circumstances. But most assuredly the practice should never be countenanced in a federal prosecution. Declaration of mistrial, reversal of conviction, or other appropriate remedy for such reprehensible conduct should be fashioned by this Court.

[6] Since 2 members of this Court voted to grant certiorari, it hardly can be asserted that the questions do not at least verge on being important.